UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

CONSOLIDATED WORK OPPORTUNITIES, INC.
Employer

and Case No. 11-RD-662

LLOYD E. KRUMM, an Individual
Petitioner

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465
Union[1]

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Consolidated Work Opportunities, Inc., is a North Carolina corporation with a facility located at the Marine Corps Air Station at Cherry Point, North Carolina, where it is engaged in the business of providing manpower contracting services pursuant to a contract with the United States Government.[2] The Union, International Union of Operating Engineers, Local 465, currently represents a bargaining unit comprised of twenty-five employees employed by the Employer under the NADEP Service Contract No. N62470-02-C-4166 at its Cherry Point location in the following job classifications: material expeditor/coordinator, stock clerk, motor vehicle

[1] The Union's name appears as amended at hearing.

[2] I am taking administrative notice that the Employer is within the jurisdiction of the National Labor Relations Board. See Consolidated Work Opportunities, Inc., 340 NLRB No. 61 (2003). The Region served a Notice of Representation Hearing on the parties on July 7, 2004. Board Exhibits 1(c) and 1(d). When the Employer failed to appear at the start of the hearing, the hearing officer contacted the Employer's office on two occasions to advise the Employer that the hearing would proceed. Nonetheless, the Employer failed to appear.

mechanic/helper, tire repairer, oiler, medium truck driver, and supply technician. The Petitioner, Lloyd E. Krumm, filed this petition with the National Labor Relations Board (hereinafter Board) under Section 9(c) of the National Labor Relations Act seeking to decertify the Union as the collective bargaining representative for the above bargaining unit. A hearing officer of the Board held a hearing and the parties waived their right to file briefs with the undersigned.

As evidenced at hearing, the sole issue is whether the collective bargaining agreement (hereinafter Contract) between the Employer and Union bars the Petitioner's petition to decertify the Union. The Union argues that the Contract is a 3-year fixed-term contract, and therefore bars the Petitioner's decertification petition. In contrast, the Petitioner argues that the Contract is not a 3-year contract, but instead a 1-year contract that is renewable year-to-year up to three years.

I have considered the evidence and arguments presented by the parties. As discussed below, I conclude that the Contract between the Employer and Union does not bar the Petitioner's petition. Accordingly, I have directed an election in the unit described above. To provide a context for my discussion of this issue, I will first provide an overview of the collective bargaining history between the Employer and Union. Second, I will provide my analysis, including a detailed discussion of the contract-bar doctrine. Finally, I will present my conclusions and findings on the issue presented.

I. COLLECTIVE BARGAINING HISTORY

In 1991, the Union became the bargaining representative of employees employed by ManCon, the preceding contractor at the Marine Air Corps Station in Cherry Point, North Carolina. The Union negotiated and executed its first contract with ManCon in

1991. Thereafter, the Union and ManCon negotiated a new contract every three consecutive years.

Sometime around October 2002, the Employer was awarded the contract at the Marine Air Corps Station and became a successor to ManCon. During the Summer 2003, the Employer and Union began negotiations for a new contract because the contract at that point in time was set to expire September 30, 2003. The Union and Employer met on several occasions during the months of June, July and August. Negotiating on behalf of the Union were the Business Manager, Henry Loftis, and two other Union representatives. The Employer's President and a supervisory official negotiated on behalf of the Employer. Business Manager Loftis testified that it was during these negotiations that the parties agreed to a 3-year contract.

Once the parties reached a proposed agreement, the Union took the final proposal to its membership for ratification. Loftis testified that the Union allowed the Employer representatives to attend the meeting during which the ratification vote took place. Loftis further testified that the Employer's negotiators were present when he informed the membership that the Contract was a 3-year agreement.[3] Subsequently, the membership ratified the Contract.

On August 21, 2003, the Employer and Union executed the Contract which sets forth the wages, hours and conditions of employment for employees in the bargaining unit. Loftis signed the Contract on behalf of the Union, and the Employer's President signed the Contract on behalf of the Employer. Although the Contract was executed on August 21, 2003, certain provisions did not become effective until October

1, 2003. Below is a brief discussion of the Contract provisions relevant to the present case.

Article 3, entitled "Purpose and Intent" provides in relevant part "…it is the intent and purpose of the Company and the Union to set forth herein the entire Agreement with respect to wages, hours, and working conditions as relates to the U.S. Navy Contract covered by this Agreement."

Article 24, entitled "Wages" provides a list of the employee classifications with their hourly rates of pay and pay increases over a 3-year period, beginning October 1, 2003.

Article 29, entitled "Health and Life Insurance Program" provides the amounts paid by the Employer towards employee health benefits, with benefit increases for successive years beginning October 1, 2004, through October 1, 2006.

Article 40, entitled "Central Pension Fund" provides the amounts contributed by the Employer to the Union pension fund, with annual $.05 increases on October 1, 2004, and October 1, 2005.

Finally, at the heart of the dispute between the Union and Petitioner, is Article 41, entitled "Duration of Agreement" (hereinafter Article 41). Article 41 provides as follows:

> "This Agreement shall be in full force and effect from August 21, 2003, to and including September 30, 2003, and shall automatically renew itself for successive periods of one (1) year each, from year-to-year thereafter unless either party gives written notice to the other party of its desire to add, eliminate or modify any provision(s) of this Agreement. The negotiations will commence within thirty (30) days after the written notice. The parties agree to begin negotiations on the next contract during the first quarter of 2006."

[3] The Petitioner testified that he was not present during contract negotiations and he did not attend the ratification vote.

Since the execution of the Contract, the Employer has not exercised its right to add, eliminate or modify any provisions in the Contract.

II. ANALYSIS

Through the years, the Board has established the contract-bar doctrine, which determines when it will "entertain petitions to displace an incumbent bargaining representative in the face of an outstanding collective bargaining agreement between the employer and the incumbent representative." Hexton Furniture Co., 111 NLRB 342, 343-44 (1955). A contract having a fixed-term of three years or less is a bar to an election for the entire duration of the contract. General Cable Corporation, 139 NLRB 1123, 1125 (1962). Contracts having fixed-terms longer than three years will preclude an election only for the first three years of the agreement. Id. The burden to establish a contract-bar rests with the party asserting that a contract-bar exists. Roosevelt Memorial Park, Inc., 187 NLRB 517, 517-18 (1970).

The purpose of the contract-bar doctrine is two-fold. The first purpose is to give the parties to the agreement time to achieve "industrial stability" without the interference of outside parties who wish to change the bargaining relationship. Union Fish Company, 156 NLRB 187, 191 (1965). The second purpose is to give employees the freedom and opportunity to chose their bargaining representative at reasonable and predictable times. Id. In an effort to maintain the stability and predictability of labor relations, the Board established a 60-day "insulated period" immediately preceding the expiration of an existing contract. Deluxe Metal Furniture Company, 121 NLRB 995, 1000-01 (1958). A petition filed during the insulated period is dismissed as untimely. Id. at 1000. In conjunction with the insulated period, the Board created a "window" during which a

petition may be properly filed. Id. at 999-1000. In Leonard Wholesale Meats Inc., the Board held that a rival petition is timely if filed more than 60 days but less than 90 days before the expiration of the contract. Leonard Wholesale Meats Inc., 136 NLRB 1000, 1001 (1962), modifying Deluxe Metal Furniture Company, supra.

A contract will bar a petition if the adequacy and term of the contract are sufficient on its face, without having to resort to parole evidence. Union Fish, 156 NLRB at 191-92; Appalachian Shale Products Co., 121 NLRB 1160 (1958). Generally, the Board will find a contract adequate if the following is present: (1) the contract is in writing, (2) the parties to the contract have signed the contract prior to the filing of the rival representation petition, (3) the contract contains substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship, (4) the contract clearly encompasses the employees sought in the petition, and (5) the contract embraces an appropriate unit. Id. at 1161-64. A contract for "members only" will not bar a representation petition. Id. at 1164. In addition, a master agreement will not bar an election at one of the employer's plants where by its terms, it is not effective until a local agreement is completed or the inclusion of the plant has been negotiated by the parties as required by the master agreement, and the rival petition is filed before these events occur. Id. There is no dispute between the Union and Petitioner regarding the adequacy of the Contract.

When analyzing the sufficiency of the contract term, the Board looks to the face of the document because that is where a petitioner would look to determine the appropriate time to file a petition. Union Fish, 156 NLRB at 191. The Board reasons that the predictability and stability of labor relations would be compromised if "reliance

were to be placed on factors other than the fixed term of the contract." Id.[4] The term on the face of the Contract is clearly a point of contention between the Union and Petitioner.

The Union argues that there is a typographical error in Article 41 of the Contract. In particular, Loftis testified that during negotiations the parties agreed to a 3-year contract set to expire as of "September 30, 2006" as opposed to "September 30, 2003" as stated on the face of the Contract. Loftis opines that the "September 30, 2003" date was included in the Contract because the preceding contract expired on that date, and someone inadvertently failed to change the year.

The Union further contends that upon reading the Contract it is clear that the parties intended the agreement to be one of a 3-year duration, as the wage provisions (Article 24), benefits provisions (Article 29) and pension provisions (Article 40) provide progressive annual increases over the course of the next three consecutive years.

Finally, the Union asserts that if the parties intended to create a contract with a duration less than 3-years, the Contract would not have included the statement in Article 41 that indicates that the parties will reconvene the first quarter of 2006 to begin negotiations on the next contract.

[4] Although Union Fish was decided during the time when the Board applied a 2-year contract-bar rule, the factual circumstances are similar to the present case. In Union Fish, on its face, the collective bargaining agreement between the employer and union stated that the contract would expire "1965". The union contended there was a typographical error in the contract and the expiration date should have been "1966", thereby barring the petition. The Board concluded that the contract could not serve as a bar to the petition because the contract on its face clearly set forth the expiration date. Id. at 192. The date on the face of the contract was where parties would look to determine the appropriate time to file a petition. Id. For the Board to use parole evidence to "vary the clear termination date established by the contract itself" would destroy the Board's goals of predictability and stability in labor relations. Id.

The Board addressed a similar situation in Bob's Big Boy Family Restaurants, 259 NLRB 153 (1981), enforcement denied 693 F.2d 904 (9th Cir. 1982). In Bob's Big Boy, there was an agreement between the incumbent union and employer which was "apparently effective" from December 11, 1974, through December 31, 1977, as provided in the agreement's term. Id. However, when the agreement was printed and distributed to employees, it contained a typographical error on its cover, listing the effective dates as "January 1, 1975, to December 31, 1977." Id. The representation petition, filed on October 13, 1977, was timely with respect to the dates on the cover of the agreement, but was two days late according to the dates in the text of the contract. Id.

Again, the Board restated the long-standing principle that when determining the appropriate time to file a petition, the petitioner must look to the existing contract between the employer and union. Id. at 154. The Board concluded, "where parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred." Id. In Bob's Big Boy, the Board found that the contract did not bar the representation petition because of the ambiguities arising from the face of the contract. Id.

As in Bob's Big Boy, the Contract in the instant matter was specific as to the duration, although, according to the Union, it inadvertently stated the wrong "effective" dates. In reading Article 41, a third party would reasonably conclude that the Contract was for a fixed-term of August 21, 2003, through September 30, 2003, and was renewable year-to-year for up to three years, at which time the Union and Employer would negotiate a new contract.

The facts in the instant case greatly differ from those in Cooper Tire and Rubber Company, 181 NLRB 509 (1970). In Cooper Tire, the employer and union executed a contract that contained a duration clause that read "this agreement shall become effective ----------, 1968 and shall remain in full force and effect until ----------, 1971 and thereafter for yearly periods...." Id. at 509. The Board found that although the specific month and day were absent from the agreement, it was clear that the parties intended the agreement to span three consecutive years. Id. The Board analyzed the duration provision in conjunction with the wage provisions that provided for annual progressive wage increases over a 3-year period beginning September 1, 1968, continuing through September 1, 1970, and concluded that the contract could be reasonably construed on its face as a 3-year contract. Id.

Unlike the duration clause in Cooper Tire, Article 41 is specific as to the duration of the Contract, thus it is unnecessary to look to the remaining contract provisions to determine the intent of the parties. In fact, ambiguities do not arise until one reads Article 41 in conjunction with other Contract provisions. Again, such ambiguities do not act to benefit the parties to the Contract, but instead require that I find that the Contract does not bar the petition.

The factual circumstances in the instant case also differ from those in Suffolk Banana Co., 328 NLRB 1086 (1999). In Suffolk Banana, the Employer and Union executed an agreement modifying wages and extending the remaining term of the contract. Id. The preamble and the terms of the agreement stated that the contract would expire "July 5, 1999". Id. However, the agreement concluded by providing that the terms and conditions of the agreement would be applicable through "July 6, 1999". Id.

The petitioner filed the petition on December 3, 1998. Id. The Board concluded that the contract barred the petition. Id. at 1087-88. However, it did so because the Board found that the petitioner did not rely on the inadvertent discrepancy to its detriment because the petition was untimely as to either date in the agreement. Id. at 1087.

In the instant case, the Petitioner appears to have relied upon the expiration date set forth in Article 41. Specifically, it appears from its face that the Contract automatically renewed for another year as of September 30, 2003. In that context, the Contract was set to renew again on September 30, 2004, for a second 1-year period. The Petitioner filed the instant petition during the authorized window period for the 1-year renewal period, which began July 3, 2004, and ended August 1, 2004. Accordingly, I find the petition was timely filed and that the Contract does not constitute a bar to the instant proceeding.

III. CONCLUSION AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees in the job classifications of material expeditor/coordinator, stock clerk, motor vehicle mechanic/helper, tire repairer, oiler, medium truck driver, and supply technician employed by the Employer under the NADEP Service Contract No. N62470-02-C-4166 in support of industrial production support department at the Naval Aviation Depot, Cherry Point, North Carolina; but excluding all office clerical employees and guards, professional employees, and supervisors as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Union of Operating Engineers, Local 465. The date time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to the Decision.

A. Voting Eligibility

Eligibility to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their

status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employee who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 12367 (1966); NLRB v. Wyman-Gordon Company, 395 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting processes, the names on the

list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 4035 University Parkway, Suite 200, P.O. Box 11467, Winston-Salem, North Carolina, 27116-1467, on or before **August 3, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (336) 631-5210. Since the list will made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **August 10, 2004.** The request may **not** be filed by facsimile.

Dated at Winston-Salem, North Carolina, this 27th day of July, 2004.

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Willie L. Clark, Jr., Regional Director
National Labor Relations Board
Region 11
4035 University Parkway, Suite 200
P. O. Box 11467
Winston-Salem, North Carolina 27116-1467